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No. 89-981

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

MIRIAM GELBAND and LEO KAYSER, III,
Individually and as Shareholders of TEXACO INC.,
suing on behalf of themselves and in the right of
and for the benefit of TEXACO INC.,

Petitioners,

v.

TEXACO INC., JOHN K. MCKINLEY,
WILLARD C. BUTCHER, FRANK T. CARY, ALFRED C. DECRANE,
JR., THE EARL OF GRANARD, JAMES W. KINNEAR, ELVIS L.
MASON, THOMAS H. MOORER, THOMAS S. MURPHY, GEORGE
PARKER, JR., LORENE L. ROGERS, ROBERT V. ROOSA, FRANZ H.
ULRICH, THOMAS A. VANDERSLICE and WILLIAM WRIGLEY,

Respondents.

Brief in Opposition to Petition For a Writ of Certiorari to The Court of Appeals of the State of New York

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QUESTIONS PRESENTED

1. Where shareholders in a consolidated class and derivative action in the Delaware courts had notice of a proposed settlement, were represented at the settlement hearing, participated in the settlement process as objectors, expressly limited their challenge to the settlement to raising a narrow question of Delaware law and declined wider participation, and the Delaware courts twice considered and rejected the shareholders' argument on its merits (both at the trial court level and on appeal before the Supreme Court of Delaware), did the New York courts properly rule that the Full Faith and Credit Clause of the United States Constitution and principles of *res judicata* bar these shareholders from relitigating the same derivative claims in New York?

2. Where shareholders failed to raise any due process objections to the participation granted them as objectors to a proposed settlement of a consolidated class and derivative action in Delaware, and abandoned on appeal in Delaware any objection to the trial court's refusal to grant their motion to intervene, may they raise these due process objections for the first time in a collateral action in an effort to avoid the force of the Full Faith and Credit Clause?

LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.

Pursuant to Supreme Court Rule 29.1, the affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission which continue to be affiliated with Texaco Inc. are as follows:

Getty Oil Company
Texaco Cogeneration Company
Texaco Pipeline Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
Norsk Texaco Oil A/S
S. A. Texaco Belgium N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S. A.
Refineria Texaco de Honduras, S. A.
Texaco Brasil S. A.—Productos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Puerto Rico Inc.
Texaco Trinidad, Inc.
Texas Petroleum Company
Texaco Chemical Company
Texas International Financial Corporation
Texaco International Trader Inc.

Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

In addition, the following are currently subsidiaries or affiliates of Texaco Inc.:

Canada Texaco Inc.
Four Star Oil & Gas Company
Texaco Canada Petroleum Inc.
Texaco Refining and Marketing Holdings Inc.

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Respondents.

Brief in Opposition to Petition For a Writ of Certiorari to The Court of Appeals of the State of New York

OPINIONS AND JUDGMENTS BELOW

This case involves a collateral attack in New York upon an Order and Final Judgment of the Delaware Court of Chancery, dated March 12, 1985, approving the settlement of a consolidated class and derivative action, *Good v. Texaco Inc.*, Consolidated C.A. No. 7501 (Del. Ch.). The Order and Final Judgment and the accompanying opinion of the

Delaware Court of Chancery are unreported, but were reproduced at pages 141-45 and 95-140 of the Record on Appeal in the Supreme Court of the State of New York, Appellate Division.

The opinion of the Supreme Court of Delaware affirming the March 12, 1985 Order and Final Judgment is reported as *Polk v. Good*, 507 A.2d 531 (Del. 1986). In addition, a copy of the opinion was reproduced at pages 190-207 of the Record on Appeal in the Supreme Court of the State of New York, Appellate Division.

The orders and opinions of the New York courts are reproduced in the Petitioners' Appendix (at pages A-1 through A-18).

INTRODUCTION

Petitioners ask this Court to review an order of the Court of Appeals of the State of New York that rejected Petitioners' attempt to relitigate certain shareholders derivative claims that were settled almost five years ago in a combined class and derivative action in state court in Delaware (the "Delaware Action").[1] Finding that Petitioners had fully participated in the Delaware Action as objectors, a New York trial court ruled that Petitioners' collateral attack on the Delaware judgment, which was affirmed by the Supreme Court of Delaware, was barred by principles of full faith and credit and *res judicata*. The New York appellate courts rejected Petitioners' appeal four times.

Petitioners now claim that the New York courts erred in giving full faith and credit to the Delaware judgment approving the settlement of the Delaware Action (the "Delaware Judgment") because Petitioners somehow did not receive due process in Delaware. This Court should reject that claim, and refuse to grant the writ of certiorari, for at least four reasons.

[1] Counsel of record designated below received the Petition through the mails on December 15, 1989.

First, the New York courts' application of principles of full faith and credit and *res judicata* is consistent with well-settled precedent and raises no important federal question of due process.

Second, Petitioners waived their due process arguments when, in the course of their full participation in the Delaware Action as objectors, they failed to raise any of these arguments in the Delaware Court of Chancery or in the Delaware Supreme Court (or in a petition for a writ of certiorari to the Delaware Supreme Court following that court's affirmance of the Delaware Judgment).

Third, Petitioners' due process claims are utterly without merit. Petitioners now contend that their due process rights were violated primarily because they were denied leave to intervene in the Delaware Action. But, throughout five years of appeals and attempts to attack collaterally the Delaware Judgment, Petitioners have *never* identified a single argument that they could have made or procedure that they could have invoked as "intervenors" in the Delaware Action that they were not allowed to make or invoke as "objectors." Nor could they. Petitioners received notice of the proposed settlement of the Delaware Action and of the court hearing to consider its fairness, appeared at the hearing as objectors, and were offered an opportunity to take discovery and present evidence to the court. Having attended only two of a number of pre-hearing depositions, Petitioners expressly declined to take further discovery and asked instead only for the right to brief and argue a single question of Delaware corporate law based upon the factual record already developed. The Delaware Court of Chancery accepted Petitioners' briefs and heard oral argument from them. When the court rejected their single legal argument on the merits and denied leave to intervene, Petitioners appealed to the Delaware Supreme Court, which also heard their legal argument and rejected it on the merits. Moreover, Petitioners never asked the Delaware Supreme Court to review the Chancery Court's denial of their request to intervene.

In short, even as "objectors" rather than "intervenors," Petitioners received everything they sought in Delaware. Petitioners now claim, for the first time, that they also were denied due process because they did not have the right to "opt out" of the settlement of the Delaware Action. But, Petitioners never asked to "opt out" of the Delaware Action; having failed to raise this claim before, they cannot raise it here for the first time. Moreover, as we explain below, this "opt out" claim, in the context of a derivative action, is without merit.

Fourth, the supposed "conflict" Petitioners have manufactured between the decision of the New York courts granting full faith and credit to the Delaware Judgment and this Court's decision in *Martin v. Wilks*, __U.S. __, 109 S. Ct. 2180 (1989) is, as we demonstrate below, illusory and does not provide a basis for this Court's review.

In sum, the dismissal of Petitioners' New York derivative action was compelled by the doctrines of full faith and credit and *res judicata*. Even if Petitioners properly preserved their due process claims, the order of the New York Court of Appeals rejecting these claims neither raises an important federal question nor conflicts with this Court's settled precedent.

STATEMENT OF THE CASE

1. The Parties

Petitioners Miriam Gelband and Leo Kayser, III allege that they own 100 and 800 shares, respectively, of common stock of Respondent Texaco Inc. ("Texaco"), a Delaware corporation. (R. 9, 16, 24)[2] The Individual Respondents were

[2] Citations to the Record on Appeal in the Supreme Court of the State of New York, Appellate Division, will be cited as "R. _ ". Citations to the Petitioners' Appendix to the Petition for a Writ of Certiorari will be cited as "A. _ ". Citations to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York will be cited as "Petition at _ ".

members of the Board of Directors of Texaco at all times relevant to this action. (R. 24)

2. Shareholders Challenge The Bass Stock Repurchase: The Delaware Action

This action arises out of Texaco's March 6, 1984 repurchase of approximately 9.9% of Texaco's outstanding common stock from a group of Texaco shareholders (the "Bass Stock Repurchase"). (R. 33, 100, 103-04) Following the announcement of the Bass Stock Repurchase, many Texaco shareholders commenced litigation against Texaco and the group that sold its shares to Texaco, claiming that, among other things, the Texaco Board of Directors had breached its fiduciary duty by approving the repurchase. The first of these shareholder actions was filed in the Delaware Court of Chancery one day after the Bass Stock Repurchase. (R. 105) Fourteen other actions — asserting individual claims on behalf of Texaco shareholders and derivative claims on behalf of Texaco — were filed in Delaware and eventually consolidated in the Court of Chancery under the caption *Good v. Texaco Inc.*, Consolidated C.A. No. 7501 (the "Delaware Action"). (R. 9, 105)

3. Petitioners Commence, But Fail To Prosecute, Their New York Derivative Action

Petitioners filed this shareholders derivative action in the Supreme Court of the State of New York (the "New York derivative action") three weeks after the *Good* complaint was filed in Delaware. Petitioners' complaint, like the complaint in the Delaware Action, asserted derivative claims on behalf of Texaco, claiming that the Bass Stock Repurchase was a waste of Texaco's corporate assets, constituted a breach of Texaco's directors' fiduciary duties and was impermissibly discriminatory under Delaware corporate law. (R. 16-22, 35-36, 86-87, 105, 149)

While the plaintiffs in the consolidated Delaware Action conducted extensive discovery (R. 36), Petitioners conducted virtually no discovery in their New York derivative action. (R. 36-37) Although Petitioners were kept advised of and were invited to participate in the discovery being conducted in the Delaware Action (R. 279), they declined this invitation, except to send counsel (who chose not to ask any questions) to just two of the six depositions. (R. 36, 279-80)

4. The Settlement Of The Delaware Action

After six months of discovery, including depositions and the production of thousands of documents, the parties reached a proposed settlement of the consolidated Delaware Action and certain other related actions. (R. 10-11, 36-37, 109-10, 196-97) Pursuant to well-established procedures,[3] Texaco mailed to all of its shareholders a comprehensive notice of a hearing on the proposed settlement. (R. 37, 45-48) The notice advised shareholders (including Petitioners) that the failure to appear at the hearing in the Delaware Court of Chancery to object to the proposed settlement could result in a waiver of all rights to object in any other proceeding. (R. 37, 47-48)

5. Petitioners Object To The Settlement And Move To Intervene In The Delaware Action

Petitioners took advantage of the Delaware procedures by moving to intervene as plaintiffs in the Delaware Action and by objecting to the settlement of the derivative claim asserted therein. (R. 38, 71-85, 86-94) Although Petitioners could have requested additional discovery and could have presented any

[3] Delaware Chancery Court Rules 23 and 23.1, identical in substance to the corresponding Federal Rules of Civil Procedure, require notice and court approval of a proposed settlement of a class or derivative action.

matter relevant to the fairness of the settlement,[4] Petitioners expressly rejected further discovery and asked instead only to be allowed to present a single legal argument based upon facts which Petitioners admitted were "undisputed." (R. 72, 154, 391)[5]

Petitioners' single legal argument raised what Petitioners called a "very narrow issue" of Delaware law, namely, whether the "business judgment rule," as applied in *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964) and *Bennett v. Propp*, 187 A.2d 405 (Del. 1962), prohibited directors from using corporate funds to repurchase the company's shares from a single group of shareholders. (*See* R. 151) Failing such a construction, Petitioners sought the reversal of the rule of law found in *Cheff* and *Bennett*.

In a colloquy with the Chancellor at the settlement hearing, Petitioners' counsel, Mr. Jaffe, expressly denied any need or desire to do anything other than submit a brief on this "very narrow issue" of Delaware law:

> MR. JAFFE: . . . We agree with Mr. Ward [an attorney for the Texaco defendants] that no substantial discovery is necessary . . . .
>
> * * *
>
> Thus, Your Honor, our position is simply that as plaintiffs we would like to intervene before this Court and have the opportunity *on the facts as they appear in this order* [the proposed order approving the settlement] to raise that question [the application of *Cheff v. Mathes*] before the courts of this state.

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[4] *See Rome v. Archer*, 197 A.2d 49, 57 (Del. 1964); Del. Chancery Court Rule 23(d).

[5] Although Petitioners now claim that they were denied due process because they could not "opt out" of the settlement of the derivative claims in the Delaware Action (Petition at 22-35), Petitioners never asked the Delaware Court of Chancery (or the Delaware Supreme Court) for permission to "opt out." Instead, as described below, they sought to—and did—participate actively in the Delaware Action.

* * *

MR. JAFFE: . . . We would like the opportunity to move for *partial summary judgment*. And let me be clear on that.

THE COURT: You would want the opportunity to do so if permitted to intervene?

MR. JAFFE: Yes.

THE COURT: Okay.

MR. JAFFE: *But without further discovery.*

(R. 387-91 (emphasis added))

The Court of Chancery allowed Petitioners to submit briefs and present oral argument on their "very narrow issue." (*See* R. 71-85)

6. The Court Of Chancery Approves The Settlement And Denies Petitioners' Motion To Intervene

In a comprehensive opinion, the Delaware Court of Chancery approved the settlement of the consolidated Delaware Action. (R. 95-140) In so doing, the Chancellor considered —and squarely rejected—Petitioners' arguments based upon the *Cheff* and *Bennett* decisions. (*See* R. 116-18, 132-34) (summarizing and rejecting Petitioners' arguments).

Having disposed of Petitioners' narrow legal challenge to the proposed settlement, the Chancellor recognized that intervention was unnecessary to Petitioners' continued prosecution of their objections before the Delaware Supreme Court:

> *I find no basis for granting the intervention sought by certain of the objecting shareholders.* To the extent that these shareholders feel that the rule embodied in *Cheff v. Mathes, supra,* should be reconsidered, this Court has no power to do so since that decision, as well as *Bennett v. Propp, supra,* are decisions of our Supreme Court which

> this Court lacks the power to overturn. *If these shareholders, as objectors to the proposed settlement, wish to seek appellate review of this Court's decision to approve the settlement and dismissal of the consolidated action for whatever their reasons, they are presumably free to do so.* At least it has been done many times before.

(R. 133-34) (emphasis added).

On March 12, 1985, the Court of Chancery entered an Order and Final Judgment (the "Delaware Judgment") approving the settlement and dismissing the Delaware Action "on the merits as to all of the Defendants and with prejudice against all of the plaintiffs, all members of the Class and all stockholders of Texaco." (R. 141-45)

7. Petitioners Appeal To The Supreme Court Of Delaware, But Abandon Their Motion To Intervene

Petitioners accepted the Chancellor's invitation and appealed from the Delaware Judgment to the Delaware Supreme Court. However, in their briefing and oral argument before the Delaware Supreme Court, Petitioners abandoned their challenge to the Chancellor's denial of their motion to intervene. Instead, as their opening brief in the Delaware Supreme Court makes clear, the *sole ground* for their appeal was the "very narrow" legal issue raised by Petitioners and rejected by the Court of Chancery:

> These objector/appellants submit this brief on the very narrow issue as to whether the Chancellor correctly interpreted the scope of the holdings in *Cheff v. Mathes*, Del. Supr., 199 A.2d 548 (1964); *Bennett v. Propp*, Del. Supr., 185 A.2d 405 (1962); *Kors v. Carey*, Del. Ch., 158 A.2d 136 (1960) as they relate to the right of directors to use corporate funds to buy out minority shareholding interests.

(R. 151)

In their briefs before the Delaware Supreme Court, Petitioners did not make any claim that they had been denied due process by the Court of Chancery, either by the denial of their motion to intervene, or otherwise. (R. 146-74, 175-89)

8. The Supreme Court Of Delaware Rejects Petitioners' Legal Argument On The Merits

After extensive briefing and oral argument in the Delaware Supreme Court, in which Petitioners fully participated (*see* R. 146-74 (opening brief); R. 175-89 (reply brief); R. 191 (indicating Petitioners' counsel's participation in oral argument)), on March 10, 1986, the Delaware Supreme Court affirmed the judgment approving the settlement of the Delaware Action. (R. 190-209) The Delaware Supreme Court specifically rejected Petitioners' argument on its merits:

> Appellants [Gelband and Kayser] contend that *Kors*, *Cheff*, and *Bennett v. Propp*, should not be interpreted to permit "greenmail," and should be limited to those instances where dissident shareholders threaten to interfere with the day-to-day business operations of a company. They argue that these cases do not sanction the repurchase at a premium of shares of those who threaten such activities as proxy fights and tender offers—the exercise of legitimate corporate "democratic processes". However, our recent decision in *Unocal* completely rejects that thesis, and we need not repeat it here. *Unocal*, 493 A.2d at 953-55. The Chancellor's conclusions were entirely consistent with the principles stated in *Unocal*.

(R. 203 (footnote omitted))[6]

Thereafter, Petitioners made no effort to obtain review in this Court of the Delaware Supreme Court's order affirming the Delaware Judgment — a judgment which Petitioners now claim was rendered without due process of law.

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[6] Accordingly, Petitioners' contention that they were denied the opportunity to be heard "on the merits of their claims" in the Delaware Action (Petition at 20) is flatly incorrect.

9. The New York Trial Court Properly Applies Principles Of Full Faith And Credit And *Res Judicata* In Dismissing The New York Derivative Action

On August 14, 1986, the Supreme Court of New York, County of New York (Tyler, J.), granted Respondents' motion to dismiss Petitioners' New York derivative action on grounds of *res judicata* and full faith and credit. (A. 1-7) Justice Tyler concluded that Petitioners' New York derivative action did nothing more than raise derivative claims respecting the Bass Stock Repurchase that already had been settled with court approval in the Delaware Action. (A. 6-7) Petitioners claimed that the New York court should not give full faith and credit to the Delaware Judgment because Petitioners did not receive due process in Delaware. However, Justice Tyler rejected Petitioners' argument, stressing their broad participation in the Delaware Action:

> Although the plaintiffs herein have asserted that their motion to intervene was denied, they were permitted to argue and object at the hearing on the settlement and to intervene to the extent that they appealed the judgment to the Supreme Court of Delaware in which it was affirmed.

(A. 6)

Justice Tyler concluded that the Delaware Judgment was entitled to full faith and credit, and dismissed Petitioners' derivative complaint on that basis. (A. 6-7)

10. The New York Appellate Division Affirms The Dismissal Of Petitioners' New York Complaint

In their arguments to the Supreme Court of New York, Appellate Division, First Department, Petitioners conceded that the Delaware courts had proper jurisdiction and committed no error in approving the settlement of the parallel shareholder lawsuits. (Reply Brief of Plaintiffs-Appellants in the Appellate Division, at 10) They also conceded that principles of *res judicata* ordinarily would bar Texaco shareholders from

relitigating issues settled in the Delaware Action. But, Petitioners claimed that they were exempt from those principles because they had not been allowed to intervene in the Delaware Action. (Reply Brief of Plaintiffs-Appellants in the Appellate Division, at 10) By Order dated May 19, 1988, the Appellate Division disagreed and unanimously affirmed the dismissal. (A. 12-13)

11. The New York Court Of Appeals Rejects Petitioners' Appeal Three Times

Petitioners next sought to appeal, as of right, to the Court of Appeals of the State of New York, on the ground that the Appellate Division's order "finally determine[d] an action where there is directly involved the construction of the constitution of the . . . United States." N.Y. Civ. Prac. L. & R. 5601 (McKinney 1989). In their required Jurisdictional Statement, Petitioners asserted, *inter alia*, that the Delaware courts had deprived them of due process "where there had been no opportunity to litigate on the merits in Delaware, and plaintiffs' application for leave to intervene in the Delaware action had been opposed by defendant and denied by the Delaware courts." (Appellants' Jurisdictional Statement in the N.Y. Court of Appeals, at 3) After full briefing of threshold jurisdictional issues, the Court of Appeals dismissed the appeal, *sua sponte*, on September 22, 1988, "upon the ground that no substantial constitutional question is directly involved." (A. 14-15)

Having failed to convince the New York Court of Appeals that their appeal presented a substantial constitutional question, Petitioners then sought a "second bite at the apple" by moving for leave to appeal to the Court of Appeals on the ground that their appeal presented important questions of New York common law.[7] The New York Court of Appeals denied that motion on June 15, 1989. (A. 16-17)

[7] A litigant in New York may seek leave to appeal to the Court of Appeals upon a showing that "the questions presented merit review by this

Petitioners then sought a "third bite at the apple" by moving to reargue the denial of leave to appeal on the ground the New York Court of Appeals had misapprehended or overlooked this Court's opinion in *Martin v. Wilks*, __ U.S. __, 109 S. Ct. 2180 (1989). After receiving the parties' submissions, the Court of Appeals denied that motion on September 14, 1989. (A. 18-19) The reargument motion represented the *seventh* occasion on which Petitioners had presented their grievances before the Delaware and New York courts over a period of more than five years.

REASONS FOR DENYING THE WRIT

I. THE DISMISSAL OF THE NEW YORK DERIVATIVE ACTION DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION OF DUE PROCESS

The New York courts dismissed Petitioners' New York derivative action based upon a sound application of well-settled principles of *res judicata* and the Full Faith and Credit Clause of the United States Constitution. This case raises no important or novel issue of full faith and credit or due process. Rather, Petitioners, as objectors in Delaware, were afforded all that due process requires and, indeed, an opportunity for participation greater than they desired, and Petitioners never presented to the Delaware courts the due process claims on which they now seek certiorari.

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court, such as that they are novel or of public importance, or involve a conflict with prior decisions of this court, or there is a conflict among the [New York] Appellate Divisions." New York Court of Appeals Rule 500.11(d)(1)(v) (McKinney 1989). *See* N.Y. Civ. Prac. L. & R. 5602 (McKinney 1989).

A. Well-Settled Principles Of Full Faith And Credit Required Dismissal Of The New York Derivative Action

It is settled beyond question that the Full Faith and Credit Clause[8] required the New York courts to give the same preclusive effect to the Delaware Judgment that Delaware courts would give to that judgment. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982); *Parker v. Hoefer*, 2 N.Y.2d 612, 616, 162 N.Y.S.2d 13, 16 ("[A] judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata* in the absence of fraud or collusion, even if obtained upon default."), *cert. denied*, 355 U.S. 833 (1957).

In Delaware, a final judgment rendered by a court of competent jurisdiction is "an absolute bar to the maintenance of a second suit in a different court upon the same matter by the same party, or his privies." *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980) (quoting *Epstein v. Chatham Park, Inc.*, 153 A.2d 180, 184 (Del. Super. Ct. 1959)). Moreover, the "absolute bar" applies equally to claims that *were* and claims that *could have been* asserted in the original action. *Ezzes v. Ackerman*, 234 A.2d 444, 445-46 (Del. 1967).[9] Thus, the New York courts were bound by the Full Faith and Credit Clause to apply the absolute *res judicata* bar with respect to claims that Petitioners made or could have made in the Delaware Action.

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[8] The Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

[9] This Court has long recognized these same principles. *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("There is little to be added to the doctrine of *res judicata* as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.") (citing *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877)).

Under Delaware law, a judgment entered upon a court-approved settlement of a class or derivative action has the same *res judicata* effect as a judgment entered after a trial. *Ezzes v. Ackerman*, 234 A.2d 444, 445 (Del. 1967).[10] Indeed, court-approved settlements of representative actions are universally accorded such *res judicata* effect. *See, e.g., King v. South Central Bell Telephone & Telegraph Co.*, 790 F.2d 524, 528-29 (6th Cir. 1986) (class action); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 648-49 (N.D. Cal. 1978) (class action), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981); *Penson v. Terminal Transport Co.*, 634 F.2d 989, 996 (5th Cir. 1981) (class action); *Maher v. Zapata Corp.*, 714 F.2d 436 (5th Cir. 1983) (derivative action); *Smith v. Allegheny Corp.*, 394 F.2d 381 (2d Cir.) (derivative action), *cert. denied*, 393 U.S. 939 (1968).

The requirements of procedural due process in the context of settlement of a representative action are also well-settled. In *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court acknowledged that due process in a "class" or "representative" suit is satisfied by notice to, and adequate representation of or participation by, class members:

> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties. . . .

311 U.S. at 42-43. *See also Martin v. Wilks*, __ U.S. __, 109 S. Ct. 2180, 2184 n.2 (1989) (same).[11]

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[10] *See also Rome v. Archer*, 197 A.2d 49, 58 (Del. 1964) (derivative action) ("The lower court recognized, as do we, our responsibility to insure the fairness of the settlement in view of the *res judicata* effect of such settlement").

[11] As developed below, the dismissal of Petitioners' New York derivative action does not conflict with this Court's holding in *Martin v. Wilks*. *See* Point II, *infra*.

Following *Hansberry*,[12] courts have consistently held that due process in the context of a settlement of a class or derivative action requires only that shareholders receive (a) adequate notice of the proposed settlement, (b) adequate representation of their interests at settlement hearings, and (c) an opportunity to participate and be heard with respect to the settlement. *Smith v. Allegheny Corp.*, 394 F.2d 381, 391 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968); *Maher v. Zapata Corp.*, 714 F.2d 436, 450-53 (5th Cir. 1983); *Geller v. Tabas*, 462 A.2d 1078, 1083 (Del. 1983). *See also Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) (nonparty shareholders were bound by judgment in shareholder derivative action when representation was adequate).[13]

In the Delaware Action, Delaware Chancery Court Rules 23 (class actions) and 23.1 (shareholder derivative actions) gave Petitioners all of the safeguards required by due process, including (a) a representative party who fairly and

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[12] Petitioners suggest that *Hansberry* supports their argument in that "[o]n the particular facts in *Hansberry*, the Court found the judgment in the prior respresentative suit would not be accorded *res judicata* because this would deny due process to nonparties not adequately represented in the first action." (Petition at 17-18) Petitioners misconstrue *Hansberry*, which held only that the interests of the plaintiff property owners in the first and second actions were not sufficiently similar to render the first action a truly "representative" suit. 311 U.S. at 44. Here, in stark constrast to *Hansberry*, it cannot be disputed that the derivative claims asserted below in Petitioners' New York derivative action are identical to those derivative claims asserted in the Delaware Action.

[13] Petitioners' assertion that *Hansberry* leaves open to question the minimum due process guidelines in representative actions (Petition at 18) is therefore without merit. As Petitioners are forced to concede, it is well settled that "notice and adequacy of representation" are the "touchstones" of due process in this context. (Petition at 18 (quoting *In re Four Seasons Sec. Laws Litig.*, 502 F.2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974)). Moreover, it avails Petitioners nothing to bemoan the need for clarification of the "interrelationships" between these two guideposts (Petition at 18), because (a) Petitioners received notice of the settlement and (b) Petitioners do not—and cannot—challenge the "adequacy of representation" because they appeared as objectors in the Delaware Action *by their own counsel*.

adequately protected the interests of "absent" shareholders,[14] (b) notice of and an opportunity to object to the proposed settlement, and (c) a requirement that the court approve the settlement as fair. *See* Del. Chancery Court Rules 23(e), 23.1.[15] These Delaware Rules mirror Rules 23 and 23.1 of the Federal Rules of Civil Procedure, which "set [ ] out a procedure carefully designed to satisfy the due process requirements established by *Hansberry*." Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589, 592 (1974). *Accord* 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1789, at 251 (2d ed. 1986) (safeguards embodied in Fed. R. Civ. P. 23 "seem plainly intended to meet" the due process requirements of *Hansberry v. Lee*).

Petitioners do not and cannot deny that they received all of the foregoing procedural protections in the Delaware Action. Instead, they now present a laundry list of alleged due process violations (none of which were presented to the Delaware courts), in an effort to undo their participation in the Delaware Action. However, the doctrine of *res judicata* itself bars Petitioners from raising their due process arguments in this Court. As described above, *res judicata* bars relitigation of claims that "were *or could have been* raised in [the prior] action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (emphasis added); *see also Ezzes v. Ackerman*, 234 A.2d 444, 445-46 (Del. 1967). Petitioners were free to raise any or all of their due process arguments in the

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[14] Petitioners never argued in the Delaware or New York courts, and do not argue here, that the representative parties in the Delaware Action were in any way inadequate.

[15] As an additional safeguard, under Delaware law a comprehensive presentation of issues is required and the Chancellor not only has the duty to invite and hear any and all objections and evidence that a shareholder wishes to present, but also has the obligation to review the record and exercise the Court's own independent business judgment to determine if the settlement is intrinsically fair in light of the circumstances. *See Polk v. Good*, 507 A.2d 531, 536 (Del. 1986); *Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 100 (Del. 1979); *Rome v. Archer*, 197 A.2d 49, 53-54 (Del. 1964).

Delaware Action, but did not. *See, e.g., Nottingham Partners v. Dana*, 564 A.2d 1089 (Del. 1989) (addressing objector's due process claim concerning inability to opt out of a Rule 23(b)(2) class action). Accordingly, principles of *res judicata* bar Petitioners from litigating their due process claims in this Court.

* * *

Even if *res judicata* did not bar the New York courts — and this Court as well — from considering Petitioners' claimed violations of due process, Petitioners have still failed to present a federal question worthy of review by this Court. Although Petitioners' principal contention appears to be that they did not receive due process in the Delaware Action because they were not allowed to intervene in that action (*see, e.g.*, Petition at 16, 21, 24-27), that contention does not warrant the granting of certiorari for at least two reasons.[16] *First*, Petitioners have failed to preserve the contention as a basis for an attack — collateral or direct — on the Delaware Judgment because (a) they never claimed in the Delaware Action that a denial of their motion to intervene would deprive them of due process and (b) they abandoned their motion to intervene on appeal to the Delaware Supreme Court. *Second*, the Delaware courts allowed Petitioners to object to the proposed settlement of the Delaware Action and offered Petitioners, as objectors, (a) all the procedural protections normally accorded intervenors and (b) greater procedural protections than Petitioners themselves believed were necessary to present their purely legal argument to the Delaware courts. Thus, Petitioners received due process in Delaware.

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[16] Petitioners also claim that they were denied due process because they could not "opt out" of the settlement of the derivative claims in the Delaware Action. As we demonstrate below, Petitioners did not present this claim in the courts below and therefore cannot present it here. But, in any event, Delaware Chancery Court Rule 23.1—like Federal Rule 23.1—does not allow a shareholder to "opt out" of a derivative action. Thus, Petitioners' claim is without merit. *See* Point I.D.1, *infra*.

B. Petitioners Failed To Preserve Their Due Process Arguments For Review By This Court

This Court has repeatedly held that it "will not decide federal constitutional issues raised here for the first time on review of state court decisions." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n. 16 (1983). *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1963); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805 (1971); *Street v. New York*, 394 U.S. 576, 582 (1969). This rule compels the rejection of Petitioners' claims.

As Petitioners concede in their Petition, they never raised *any* of their due process arguments in the Delaware courts. (*See* Petition at 12-15) In particular, Petitioners never claimed in the Delaware Court of Chancery that a denial of their request to intervene would offend due process. On the contrary, when allowed to participate in the Delaware action as objectors, Petitioners expressly declined to exercise all of the rights offered to them in that capacity.

Further, although Petitioners purported to appeal from the Chancellor's denial of intervention, they never challenged the denial in their briefing and oral argument before the Delaware Supreme Court.[17] (*See* R. 146-89) Instead, Petitioners styled their *sole* ground for appeal to the Delaware Supreme Court as the "very narrow issue" of whether the Chancellor had correctly construed the scope of the business judgment rule under Delaware law, as it relates "to the right of directors to use corporate funds to buy out minority shareholding interests." (R. 151)

[17] Petitioners also did not challenge in Delaware—either before the Court of Chancery or on appeal to the Delaware Supreme Court—the lack of notice of the settlement negotiations, the standard of review applied to the settlement, the inability to "opt out" of the settlement of the derivative claim, or the order of the Court of Chancery staying prosecution of their New York action pending a final determination of the Delaware Action. Thus, Petitioners also waived any claim that these rulings violated due process.

Under Delaware law, Petitioners abandoned their appeal of the denial of intervention when they failed to brief or argue the point to the Delaware Supreme Court. *See Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958) (a point not briefed is a point abandoned).[18] Having abandoned their attempt to intervene in the Delaware Supreme Court, and having failed to make any due process argument of any kind in the Delaware courts, Petitioners would have been barred from challenging the denial of intervention had they applied in this Court for a writ of certiorari to the Delaware Supreme Court. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1963). *A fortiori*, Petitioners cannot revive these already-waived due process claims by bringing a collateral attack upon the Delaware Judgment in New York. *See In re Antibiotic Antitrust Actions*, 333 F. Supp. 296, 298 (S.D.N.Y.) (where class members receive notice of and actually participate in the hearing on a proposed settlement, a direct appeal of the judgment approving the settlement is the only proper way to obtain appellate review) , *aff'd sub nom. Connors v. Chas. Pfizer & Co.*, 450 F.2d 1119 (2d Cir. 1971), *cert. denied*, 408 U.S. 930 (1972) ; *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (sole proper avenue of appeal for class member who participates at a settlement hearing and is dissatisfied with a judgment approving a settlement is a direct appeal). *See also Brown v. Georgia Power Co.*, 371 F. Supp. 543, 546 (S.D. Ga. 1973) ("the failure of the plaintiff to avail himself of his opportunity to challenge the procedure complained of by direct attack operates to bar collateral considerations of the issues upon the familiar doctrine of *res judicata*."), *aff'd*, 491 F.2d 117 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974).

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[18] A state "certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (emphasis in original; citations omitted); *Thomas v. Arn*, 474 U.S. 140, 156 (1985). Petitioners do not challenge the validity of the Delaware rule requiring briefing to preserve a claim on appeal.

C. In The Delaware Action, Petitioners Received, As Objectors, All The Due Process Protections Requested By Them—And More

Even if Petitioners have not waived their right to present their due process claims to this Court, Petitioners' intervention argument should be rejected because it elevates form over substance. Petitioners now claim that, although they were allowed to appear and present their arguments in the Delaware Action as "objectors," they were denied due process because they were denied the status of "intervenors." But, Petitioners *never* explain what they could have done as "intervenors" in Delaware that they did not do as "objectors." Nor can they.

There is no practical difference between opposing the proposed settlement of a derivative action as an "intervenor" or as an "objector." As the court explained in *Webcor Electronics v. Whiting*, 101 F.R.D. 461 (D. Del. 1984), a case strikingly similar to the Delaware Action, a shareholder's "title as an 'intervenor' or 'objector' holds no importance" in this context because the shareholder has a right to present briefs and arguments and take discovery into the fairness of the settlement in either capacity. *Id.* at 463; *see also In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir.) (shareholder given full opportunity to object to settlement of derivative action has no right to intervene), *cert. denied*, 469 U.S. 858 (1984).

In fact, although denied the title of "intervenors," Petitioners received everything they asked for, and their rights were fully protected in the Delaware Action. The following facts are undisputed. Petitioners received actual notice of the proposed settlement of the Delaware Action and of the hearing to consider the fairness of the proposed settlement. (R. 45-48)[19] As objectors, Petitioners were allowed to challenge the proposed settlement of the Delaware Action.

[19] Accordingly, Petitioners' discourse on the "adequacy of notice" principles embodied in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and its progeny (Petition at 18-19) is irrelevant.

Petitioners were given the opportunity to conduct discovery and present evidence to the court. However, in open court, Petitioners specifically and unequivocally declined the opportunity for further discovery, and explained that they wanted only to challenge the proposed settlement of the derivative claim by making a purely legal argument based upon the factual record already developed. (R. 391)

The Chancellor granted Petitioners' request. Petitioners filed briefs in opposition to the settlement of the derivative claim, and Petitioners' counsel participated in oral argument before the Court of Chancery. (R. 387-92) The Court of Chancery considered Petitioners' argument and rejected it on its merits. (R. 125-28, 133)

Under the circumstances, the Chancellor's denial of the motion to intervene did not deprive Petitioners of due process. *See, e.g., Webcor Electronics*, 101 F.R.D. at 466 (shareholder denied intervenor status received due process when allowed to present all arguments in opposition to proposed settlement of derivative action as an objector); *In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d at 1087; *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984) (denying shareholder's motion to intervene in a derivative action; the shareholder "was afforded the full panoply of procedural due process when he received adequate notice of the settlement hearing and had the significant opportunity to be heard by submitting an extensive memorandum to the court prior to the hearing detailing his objection to the settlement").[20]

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[20] *See also Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584 (6th Cir.), *cert. denied*, 459 U.S. 969 (1982); *Officers For Justice v. Civil Serv. Comm'n of San Francisco*, 473 F. Supp. 801, 829-30 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Alaniz v. California Processors, Inc.* 73 F.R.D. 289, 295 (N.D. Cal. 1976) *aff'd sub nom. Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978).

Moreover, as the Chancellor recognized (R. 133-34), intervention was unnecessary to enable Petitioners to present their purely legal argument to the Delaware Supreme Court. Petitioners appealed from the Delaware Judgment to the Delaware Supreme Court, which accepted two briefs from Petitioners (R. 146-89) and heard argument from their counsel. (*See* R. 191)[21] The Delaware Supreme Court considered Petitioners' argument under Delaware law and rejected the argument on the merits. (R. 203 ("our recent decision in *Unocal* completely rejects [Petitioners'] thesis")) Petitioners do not identify anything else that they could have done in the Delaware Supreme Court as "intervenors."

* * *

In *Jones v. Nuclear Pharmacy, Inc.*, *supra*, the Tenth Circuit held that "[a]lthough the right to be heard is an integral part of due process, an individual entitled to such process is not entitled to dictate to the court the precise manner in which he is to be heard." 741 F.2d at 325. The *Jones* court's holding is equally applicable here. Petitioners were allowed to object to the settlement of the Delaware Action, and received *everything* that they asked for, even as "objectors." Thus, Petitioners' due process claim based upon the denial of intervention is simply an improper attempt to "dictate to the court" the manner in which they wished to be heard. Petitioners' claim is without merit.

D. Petitioners' Other Claims Are Without Substance

Like their intervention claim, Petitioners' other arguments do not present properly preserved questions for this Court; nor do they present important federal questions of due process.

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[21] In the Delaware Supreme Court, Petitioners continued to concede that the "material facts of this matter are not in dispute." (R. 154)

1. *The Opt-Out Argument*

Petitioners argue that they were denied due process because they were not allowed to "opt out" of the court approved settlement of the Delaware Action (Petition at 22-25). However, Petitioners never asked to "opt out" of the Delaware Action, and have never before claimed — either in Delaware or New York — that their inability to "opt out" of the settlement of the Delaware Action was a denial of due process. Petitioners cannot raise that claim here for the first time. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1963).

Moreover, Petitioners' reliance upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) is misplaced, because *Shutts* was a *class action* for money damages inflicted directly on the members of a plaintiff class. Here, in contrast to *Shutts*, Petitioners asserted only *derivative* claims in their New York action, and their arguments in the Delaware Action focused exclusively on the merits of the derivative claims asserted there. (*See* R. 16-22, 72, 75, 86-87, 172) Shareholder derivative claims are fundamentally different from class claims, because shareholders have no *individual* interests to protect in a derivative action. In fact, the Delaware Chancery Court Rules and the Federal Rules of Civil Procedure recognize this fundamental difference between class actions and derivative actions, and Delaware Chancery Court Rule 23.1, like Federal Rule 23.1, does not give shareholders the right to "opt out" of the settlement of a derivative action. *See Guenther v. Pacific Telecom, Inc.*, 123 F.R.D. 341, 347 (D. Or. 1987) (noting that Federal Rule 23.1 does not allow shareholders to opt out of a derivative suit). Thus, the class action "opt out" rules discussed in *Shutts* are not applicable here.[22]

[22] Petitioners' complaint about the inability to "opt out" of the settlement of the derivative claim in Delaware could be construed as a claim that *Rule 23.1 itself* violates due process. That claim is without merit. In a derivative action, the shareholder plaintiff seeks to enforce a right

2. *The Standard Of Review Argument*

Petitioners also argue that the supposedly "highly limited" standard of review applied by the Delaware courts to the proposed settlement of the Delaware Action deprived them of due process, because Petitioners' opportunity to present objections under the "highly limited" standard of review was not "equivalent to a determination on the merits." (Petition at 20-21)

Here again, Petitioners' failed to preserve that objection for review by this Court because they failed to present any such objection to the courts below—in Delaware or New York. In any event, the standard of review employed by the Delaware courts — whether the settlement was "fair and reasonable and adequate under the circumstances" — is universally accepted in representative suits as the proper standard of review of a proposed settlement in class or derivative action. *See, e.g., Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Girsh v. Jepson*, 521 F.2d 153, 160 (3d Cir. 1975).

Similarly, the "abuse of discretion" standard applied by the Supreme Court of Delaware (R. 199) is consistently applied in Delaware, *see Neponsit Investment Co. v. Abramson*, 405 A.2d 97, 100 (Del. 1979); *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964), and in the federal courts. *See, e.g., Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *In re*

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belonging to *the corporation*—not to himself—and any recovery is for the benefit of *the corporation*. In this context, the shareholders have no individual interests to protect, and there is not need for a procedure that would allow a shareholder to "opt out." Where, as here, a shareholder believes that a proposed settlement of a derivative action is unfair to the corporation, the shareholder can fully protect his rights by objecting to the settlement. *See In re General Tire & Rubber Co., Sec. Litig.*, 726 F.2d at 1087; *Webcor*, 101 F.R.D. at 466 (and the cases cited therein).

Warner Communications Sec. Litig., 798 F.2d 35, 37 (2d Cir. 1986); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* § 23.80[4] at 23-486 n.5 (2d ed. 1987).[23]

Petitioners cite *Ross v. Bernhard*, 396 U.S. 531 (1970) (Petition at 21-22), for the proposition that the constitution entitled them to a trial on the merits of their derivative claim. That assertion is frivolous. *Ross* deals only with the question whether a shareholder plaintiff is entitled to try a derivative claim before a jury, rather than before the court. Nothing in *Ross* suggests that derivative claims cannot be settled before trial, or that an objector to such a settlement has the right to try his claim where, as here, the court concludes that the settlement is fair, reasonable and adequate.

Moreover, Petitioners cannot dispute that they did receive a full hearing on their legal argument concerning Delaware corporate law. Petitioners admitted in the Delaware Action that the facts were undisputed (R. 72, 154, 391), and the Court of Chancery and the Delaware Supreme Court considered and rejected Petitioners' legal argument *on the merits*. Thus, Petitioners *did* receive a "determination on the merits" of the one claim they wished to pursue.

II. THE DISMISSAL OF PETITIONERS' NEW YORK DERIVATIVE ACTION WAS NOT INCONSISTENT WITH *MARTIN V. WILKS*

In an attempt to manufacture a conflict with a prior decision of this Court, Petitioners seek to portray the dismissal of their New York action as inconsistent with this Court's recent decision in *Martin v. Wilks*, __ U.S. __, 109 S. Ct. 2180 (1989) (Petition at 27-35). *Martin*, however, is inapposite. Nor

[23] The "fair, reasonable and adequate" and "abuse of discretion" standards serve the salutary purpose of allowing a court to assess the merits of a proposed settlement without conducting a full-blown trial on the merits, which would defeat the purpose of the settlement. *See, e.g., City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).

does it make a "dramatic departure" from the principles of *res judicata* applicable to persons, like Petitioners, who were afforded ample opportunity to challenge a proposed settlement of a derivative claim. *Martin* holds only that, absent resort to class or other representative procedures, "a party seeking a judgment binding on another cannot obligate that person to intervene but must join such person as a party" in accordance with the Federal Rules of Civil Procedure. 109 S. Ct. at 2185.[24]

In *Martin*, this Court allowed certain white firefighters in Birmingham, Alabama — who were not parties to a prior action that resulted in an affirmative action consent decree between the plaintiffs, black firefighters, and the defendant city — to attack the decree when the city invoked it as a basis for employment decisions affecting the white firefighters. The city argued that the white firefighters should be bound by the decree because they had failed timely to intervene in the black firefighters' action against the city, notwithstanding their receipt of notice of the proposed consent decree. This Court held that the Federal Rules of Civil Procedure place the burden on the party seeking to bind others to a judgment to join such persons as parties to the action. 109 S. Ct. at 2185. Consequently, the white firefighters' failure to intervene did not except the case from the governing "principle of general application in Anglo-American jurisprudence" —

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[24] Petitioners' reliance on *Society Hill Civic Assocation v. Harris*, 632 F.2d 1045 (3d Cir. 1980) (Petition at 25) is likewise misplaced. *Society Hill* held that the plaintiffs could not, consistent with due process, be barred from collaterally attacking a consent decree in a prior action because (a) the prior action was not certified as a class action, (b) the plaintiffs were not parties to that prior action, and (c) the plaintiffs had not been allowed to challenge the consent decree in the prior action. *See* 632 F.2d at 1050-53 and n. 4. Here, of course, Petitioners were represented and actually participated as objectors in the proceedings that led to the settlement and judgment in the Delaware Action.

> [T]hat one is not bound by a judgment in *personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . . .

109 S. Ct. at 2184 (quoting *Hansberry*, 311 U.S. at 40; citations omitted; footnote omitted).

However, in *Martin*, this Court expressly "recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." 109 S. Ct. at 2184 n.2 (citations omitted). In the Delaware Action, Petitioners' interests were adequately represented "by someone with the same interests who [was] a party." Petitioners have never complained about the adequacy of the representative parties in the Delaware Action. Moreover, as described above, Petitioners received notice of and an ample opportunity to object to the settlement of the Delaware Action, and the Delaware courts carefully considered Petitioners' arguments. Thus, the exception noted in *Martin* for representative actions is fully applicable here and is dispositive.

Indeed, the fundamental distinction between representative and non-representative actions renders *Martin* vastly different from this case. Class actions are specifically designed to enable a plaintiff to bind others to a judgment without the necessity of joinder because, *inter alia*, "the class is so numerous that joinder of all members is impracticable." Del. Chancery Court Rule 23(a); *see* Fed. R. Civ. P. 23(a). Likewise, a derivative action enables one or more shareholders to "enforce a right of a corporation" without joining each and every shareholder in the action. Del. Chancery Court Rule 23.1; *see* Fed. R. Civ. P. 23.1. As this Court recognized in *Martin*, to apply *Martin*'s joinder requirement in these "representative" actions would defeat the purposes behind class and derivative actions. *See* 109 S. Ct. at 2184 n. 2.

Moreover, Petitioners' claim that *Martin* justifies the granting of certiorari merely because the Delaware courts denied Petitioners the opportunity to intervene elevates form over substance. The white firefighters in *Martin* had not been members of the class in the action brought by the black firefighters which gave rise to the consent decree. Thus, the denial of the white firefighters' motion to intervene in that action deprived them of a hearing and a disposition of their objections to the consent decree.[25] Here, in stark contrast to *Martin*, the denial of intervention in the Delaware Action was irrelevant, because Petitioners, as Texaco shareholders, were allowed to object to the settlement of the derivative claims, received all of the procedural protections they wished (even without the label "intervenor") and were offered, but declined, wider participation.[26]

Unlike the white firefighters in *Martin*, Petitioners received from the Delaware courts an adjudication *on the merits* of their objections to the settlement. Nothing in *Martin* allows Petitioners the opportunity to relitigate their derivative claims in New York. The New York courts correctly granted full faith and credit to the Delaware Judgment.

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[25] As this Court noted, the Birmingham Firefighters Association (of which the white firefighters were members) appeared in the first action only in the role of "amicus curiae"—a limited degree of participation which, as the Eleventh Circuit noted, "hardly made the BFA a party to the consent decrees." *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1499 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, __U.S. __, 109 S. Ct. 2180 (1989).

[26] Even if the white firefighters in *Martin* had been granted the same broad substantive and procedural rights offered Petitioners in the Delaware Action (as Petitioners seem to imply, Petition at 33-34), *Martin* would still be distinguishable on at least two independent grounds. First, by failing in Delaware to challenge the procedures as inadequate, Petitioners waived the contentions they now raise in their Petition. Second, the only issue raised by Petitioners in Delaware was a purely legal challenge to the settlement under Delaware law, which the Delaware courts considered and rejected on its merits.

CONCLUSION

For the foregoing reasons, Respondents urge the Court to deny the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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Respectfully submitted,

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